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long as the applicable insurance fund does not incur any loss with respect to such uninsured deposit liabilities in an amount greater than the loss which would have been incurred with respect to such liabilities if the institution had been liquidated.

[58 FR 67664, Dec. 22, 1993, as amended at 63 FR 37761, July 14, 1998]

§ 360.2 Federal Home Loan banks as secured creditors.

(a) Notwithstanding any other provisions of federal or state law or any other provisions of these regulations, the receiver of a borrower from a Federal Home Loan Bank shall recognize the priority of any security interest granted to a Federal Home Loan Bank by any member of any Federal Home Loan Bank or any affiliate of any such member, whether such security interest is in specifically designated assets or a blanket interest in all assets or categories of assets, over the claims and rights of any other party (including any receiver, conservator, trustee or similar party having rights of a lien creditor) other than claims and rights that

(1) Would be entitled to priority under otherwise applicable law; and

(2) Are held by actual bona fide purchasers for value or by actual secured parties that are secured by actual perfected security interests.

(b) If the receiver rather than the Bank shall have possession of any collateral consisting of notes, securities, other instruments, chattel paper or cash securing advances of the Bank, the receiver shall, upon request by the Bank, promptly deliver possession of such collateral to the Bank or its designee.

(c) In the event that a receiver is appointed for any member of a Federal Home Loan Bank, the following procedures shall apply:

(1) The receiver and the Bank shall immediately seek and develop a mutually agreeable plan for the payment of any advances made by the Bank to such borrower or for the servicing, foreclosure upon and liquidation of the collateral securing any such advances, taking into account the nature and amount of such collateral, the markets in which such collateral is normally

traded or sold and other relevant factors.

(2) In the event that the receiver and the Bank shall not, in good faith, be able to develop such a mutually agreeable plan, or, in the interim, the Bank in good faith reasonably concludes that the value of such collateral is decreasing, because of interest rate or other market changes, at such a rate that to delay liquidation or other exercise of the Bank's rights as a secured party for the development of a mutually agreeable plan could reasonably cause the value of such collateral to decrease to an amount that is insufficient to satisfy the Bank's claim in full, the Bank may, at any time thereafter if permitted to do so by the terms of the advances or other security agreement with such borrower or otherwise by applicable law, proceed to foreclose upon, sell, lease or otherwise dispose of such collateral (or any portion thereof), or otherwise exercise its rights as a secured party, provided that the Bank acts in good faith and in a commercially reasonable manner and otherwise in accordance with applicable law.

(3) The foregoing provisions of this paragraph (c) shall not apply in the event that a purchase and assumption transaction is entered into regarding any such member.

(d) The Bank's rights pursuant to the second sentence of section 10(d) of the Federal Home Loan Bank Act shall not be affected or diminished by any provisions of state law that may be applicable to a security interest in property of the member.

(e) The receiver for a borrower from a Federal Home Loan Bank shall allow a claim for a prepayment fee by the Bank if, and only if:

(1) The claim is made pursuant to a written contract that provides for a prepayment fee, provided, however, that such prepayment fee allowed by the receiver shall not exceed the present value of the loss attributable to the difference between the contract rate of the secured borrowing and the reinvestment rate then available to the Bank; and

(2) The indebtedness owed to the Bank by such borrower is secured by sufficient collateral in which a perfected security interest in favor of the

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Bank exists or as to which the Bank's security interest is entitled to priority under section 306(d) of the Competitive Equality Banking Act of 1987 (CEBA) (12 U.S.C. 1430(e), footnote (1), or otherwise so that the aggregate of the outstanding principal on the advances secured by such collateral, the accrued but unpaid interest thereon and the prepayment fee applicable to such advances can be paid in full from the amounts realized from such collateral. For purposes of this paragraph (e)(2), the adequacy of such collateral shall be determined as of the date such prepayment fees shall be due and payable under the terms of the written contract providing therefor.

[54 FR 19156, May 4, 1989. Redesignated at 54 FR 42801, Oct. 18, 1989, and further redesignated at 55 FR 46496, Nov. 5, 1990. Redesignated at 58 FR 67664, Dec. 22, 1993, as amended at 63 FR 37761, July 14, 1998]

§ 360.3 Priorities.

(a) Unsecured claims against an association or the receiver that are proved to the satisfaction of the receiver shall have priority in the following order:

(1) Administrative expenses of the receiver, including the costs, expenses, and debts of the receiver;

(2) Administrative expenses of the association, *provided* that such expenses were incurred within thirty (30) days prior to the receiver's taking possession, and that such expenses shall be limited to reasonable expenses incurred for services actually provided by accountants, attorneys, appraisers, examiners, or management companies, or reasonable expenses incurred by employees which were authorized and reimbursable under a pre-existing expense reimbursement policy, that, in the opinion of the receiver, are of benefit to the receivership, and shall not include wages or salaries of employees of the association;

(3) Claims for wages and salaries, including vacation and sick leave pay and contributions to employee benefit plans, earned prior to the appointment of the receiver by an employee of the association whom the receiver determines it is in the best interests of the receivership to engage or retain for a reasonable period of time;

(4) If authorized by the receiver, claims for wages and salaries, including vacation and sick leave pay and contributions to employee benefits plans, earned prior to the appointment of the receiver, up to a maximum of three thousand dollars (\$3,000) per person, by an employee of the association not engaged or retained pursuant to a determination by the receiver pursuant to the third category above;

(5) Claims of governmental units for unpaid taxes, other than Federal income taxes, except to the extent subordinated pursuant to applicable law; but no other claim of a governmental unit shall have a priority higher than that of a general creditor under paragraph (a)(6) of this section;

(6) Claims for withdrawable accounts, including those of the Corporation as subrogee or transferee, and all other claims which have accrued and become unconditionally fixed on or before the date of default, whether liquidated or unliquidated, except as provided in paragraphs (a)(1) through (a)(5) of this section, provided, however, that if the association is chartered and was operated under the laws of a state that provided a priority for holders of withdrawable accounts over such other claims or general creditors, such priority within this paragraph (a)(6) shall be observed by the receiver; and provided further, that if deposits of a Federal association are booked or registered at an office of such association that is located in a State that provides such priority with respect to State-chartered associations, such deposits in a Federal association shall have priority over such other claims or general creditors, which shall be observed by the receiver;

(7) Claims other than those that have accrued and become unconditionally fixed on or before the date of default, including claims for interest after the date of default on claims under paragraph (a)(6) of this section, *Provided* that any claim based on an agreement for accelerated, stipulated, or liquidated damages, which claim did not accrue prior to the date of default, shall be considered as not having accrued and become unconditionally fixed on or before the date of default;